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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
vs.	)	Case No. 02-40006-01-JAR
	)	
WILLIAM CHARLES MCBRIDE,	)	
	)	
Defendant.	)	
_____	)	

**MEMORANDUM ORDER AND OPINION ON SENTENCING**

On September 27, 2004, the Court conducted a sentencing hearing. The defendant, William Charles McBride, had pled guilty to a felony offense, possession with intent to distribute 12.07 grams of cocaine base in March 2001. At the sentencing hearing the Court heard oral argument on the defendant's objections to application of the career offender<sup>1</sup> and gun enhancement<sup>2</sup> sentencing guidelines. The defendant argued that the Supreme Court's recent decision in *Blakely v. Washington*<sup>3</sup> rendered application of these two guidelines unconstitutional. The defendant does not challenge the constitutionality of the federal sentencing guidelines in total; he challenges the constitutionality of applying these two enhancement guidelines, and challenges the constitutionality of the judicial determination of criminal history.

In *Blakely*, the Supreme Court held that the Sixth Amendment right to trial by jury was

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<sup>1</sup>U.S.S.G. § 4B1.1

<sup>2</sup>U.S.S.G. § 2D1.11(b)(1)

<sup>3</sup>--- U.S.--, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

violated by imposition of a sentence above the “statutory maximum of the standard range” in the State of Washington’s sentencing guidelines, because the sentence enhancement was based on aggravating facts that were determined by judicial, rather than jury fact finding.<sup>4</sup> Thus, the Sixth Amendment is violated by imposition of a sentence greater than “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. . . . [T]he relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.”<sup>5</sup> The Sixth Amendment is violated by judicial fact finding of facts germane to the application of a sentence enhancement. *Blakely* instructs that the Sixth Amendment is not violated if the defendant admits or stipulates to the facts germane to application of the sentence enhancement.<sup>6</sup> *Blakely* further instructs that nothing prevents the defendant from waiving his right to a jury trial of sentence enhancements.<sup>7</sup>

At this writing, it is unsettled whether *Blakely* extends to the federal sentencing guidelines. The Supreme Court noted in *Blakely*, that it expressed no opinion on the federal sentencing guidelines.<sup>8</sup> In the aftermath of *Blakely*, there have been dozens of reported and unreported decisions concerning *Blakely*’s applicability to the federal sentencing guidelines.

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<sup>4</sup>*Id.*

<sup>5</sup>*Id.* 124 S. Ct. at 2537 (citations omitted).

<sup>6</sup>*Id.*

<sup>7</sup>*Id.* 124 S. Ct. at 2541; see *U.S. v. Savarese*, —F.3d ---, 2004 WL 2106341 (1<sup>st</sup> Cir. Sept. 22, 2004)(applying plain error analysis to *Blakely* claim that appellant did not raise at or before sentencing).

<sup>8</sup>124 S.Ct. at 2538 n. 9.

There is a split in the Circuit Courts of Appeal. The Fourth,<sup>9</sup> Fifth,<sup>10</sup> Sixth,<sup>11</sup> and Eleventh<sup>12</sup> Circuits have held that *Blakely* is not applicable to the federal sentencing guidelines. The Second Circuit has certified three questions to the Supreme Court concerning the constitutionality of the federal sentencing guidelines.<sup>13</sup> The Seventh Circuit<sup>14</sup> has held *Blakely* applicable to the federal sentencing guidelines. The Ninth Circuit<sup>15</sup> has held that *Blakely* applies to the federal sentencing guidelines, and infirm guidelines are severable.

In *Leonard v. United States*,<sup>16</sup> the Tenth Circuit denied a § 2255 motion<sup>17</sup> based on *Blakely*, noting that the Supreme Court had neither ruled that *Blakely* is applicable to the federal sentencing guidelines, nor expressly held that the rule announced in *Blakely* is retroactive to cases on collateral review. In October 2004, the Supreme Court will hear oral argument on an appeal from the Seventh Circuit's *Booker*<sup>18</sup> decision holding the federal sentencing guidelines unconstitutional. For the reasons discussed below, this Court need not reach the issue of *Blakely*'s applicability to the federal sentencing guidelines.

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<sup>9</sup>*U.S. v. Hammoud*, ---F.3d ---, 2004 WL 2005622 (4<sup>th</sup> Cir. Sep. 8, 2004).

<sup>10</sup>*U.S. v. Pineiro*, 377 F.3d 464 (5<sup>th</sup> Cir. 2004).

<sup>11</sup>*U.S. v. Koch*, --- F.3d ---, 2004 WL 1899930 (6<sup>th</sup> Cir. Aug. 26, 2004).

<sup>12</sup>*U.S. v. Reese*, --- F.3d ---, 2004 WL 1946076 (11<sup>th</sup> Cir. Sept. 2, 2004).

<sup>13</sup>*U.S. v. Penaranda*, 375 F.3d 238 (2d Cir. 2004).

<sup>14</sup>*U.S. v. Booker*, 375 F.3d 508 (7<sup>th</sup> Cir. 2004), *cert.granted*, ---S.Ct.---, 2004 WL 1713654, 73 USLW 3073 (U.S. Aug. 2, 2004).

<sup>15</sup>*U.S. v. Ameline*, 376 F.3d 967 (9<sup>th</sup> Cir. 2004).

<sup>16</sup>---F.3d ---, 2004 WL 2048682 (10<sup>th</sup> Cir. Sep. 8, 2004).

<sup>17</sup>28 U.S.C. § 2255.

<sup>18</sup>*U.S. v. Booker*, 375 F.3d at 508.

### ***Career Offender Guideline***

In this case, the Court need not decide whether *Blakely* extends to the federal sentencing guidelines. The defendant does not dispute any facts material to application of the career offender guideline. He admits that: he was at least 18 years old when he committed the current offense; the instant offense of conviction, possession with intent to distribute approximately 12.07 grams of cocaine base, is a felony controlled substance offense; and he has at least two prior felony convictions of either a crime of violence or a controlled substance offense.<sup>19</sup> Thus, this Court can apply the career offender guideline without deciding whether *Blakely* applies to the federal sentencing guidelines, for no Sixth Amendment right is implicated when a defendant receives a greater sentence based entirely on facts that the defendant admits.<sup>20</sup>

Moreover, in *Blakely*, the Supreme Court reiterated its holding in *Apprendi*, that “the fact of a prior conviction,” is properly subject to judicial determination;<sup>21</sup> the Sixth Amendment rights implicated in the application of mandatory minimums and sentencing guidelines, do not apply to determination of criminal history. Application of the career offender guideline is based largely on the defendant’s criminal history. The “fact of [the] prior conviction[s],” including what offenses defendant was convicted of and whether the offenses were felony or misdemeanor crimes, are facts properly determined by the judge, both in the context of computing criminal history and in the context of determining whether the career offender guideline applies. Surely, the judge can

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<sup>19</sup>The defendant has prior felony convictions for: attempted possession of cocaine with intent to sell; possession with intent to distribute controlled substance; and aggravated indecent liberties with a child.

<sup>20</sup>*Blakely*, 124 S.Ct. at 2537.

<sup>21</sup>*Id.* at 2536-37 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)).

also, without violence to the Sixth Amendment, determine the “fact of [the instant] conviction,” that is, whether the instant offense of conviction is a crime of violence or controlled substance offense. The third factual determination germane to application of the career offender guideline is the defendant’s age at the time he committed the instant offense of conviction. Even this determination is arguably one subject to judicial determination, for a defendant’s age is a relevant consideration in computing the defendant’s criminal history. The judge must necessarily make a finding of the defendant’s age, for application of the guideline entitled “Definitions and Instructions for Computing Criminal History”<sup>22</sup> requires a separate computation for any “Offenses Committed Prior to Age Eighteen.”<sup>23</sup> Thus, even if *Blakely* extends to the federal sentencing guidelines, this Court can apply the career offender guideline without violating the defendant’s Sixth Amendment rights.

### ***Gun Enhancement Guideline***

Application of the gun enhancement guideline requires a determination of whether “a dangerous weapon (including a firearm) was possessed” during the offense. Neither during the plea colloquy, nor in the plea agreement or plea petition, did the defendant admit to the possession of a dangerous weapon during the offense. The defendant disputes this fact.

Yet the Court need not reach the issue of *Blakely*’s applicability, for the defendant’s total offense level is not affected by the gun enhancement guideline. The base offense level for the offense of conviction is 26. If the Court applies the gun enhancement guideline, the offense level is increased by two levels, to level 28. The offense level is then decreased by three levels for

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<sup>22</sup>U.S.S.G. § 4A1.2

<sup>23</sup>U.S.S.G. § 4A1.2(d).

timely acceptance of responsibility.<sup>24</sup> At this point the adjusted offense level is either 23 (no gun enhancement) or 25 (with gun enhancement). Whether the offense level is 23 or 25, application of the career offender guideline results in an increase to Level 34.<sup>25</sup> The career offender guideline increases the offense level, based on the statutory maximum penalty for the offense of conviction, and without regard to what the base or adjusted offense level is at that point. The defendant's offense of conviction, possession with intent to distribute cocaine base, has a statutory maximum penalty of 40 years. The career offender guideline dictates that the offense level is adjusted upward to Level 34 if the offense of conviction has a statutory maximum of 25 years or more.<sup>26</sup> Thus, whether or not the gun enhancement is applied, application of the career offender guideline results in an increase to Level 34. The career offender guideline also deems the criminal history as Category VI, without regard for the actual computation of criminal history.<sup>27</sup>

After giving the defendant credit for acceptance of responsibility, and other appropriate mitigating circumstances, this Court's sentence reflects a sentence at the bottom of the sentencing range for the appropriate total offense level and criminal history category. This would be the Court's sentence whether or not it applied the gun enhancement. And, if the federal

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<sup>24</sup>U.S.S.G. § 3E1.1(a).

<sup>25</sup>U.S.S.G. § 1B1.1(b)-(f) instruct courts to apply the guidelines in order of the chapter in the Guidelines Manual: base offense level and specific offense characteristics; followed by victim, role and obstruction guidelines; followed by acceptance of responsibility; followed by criminal history category; followed by other applicable adjustments in Part B of Chapter Four, including the career offender provision.

<sup>26</sup>This guideline has a graduated scale: offenses with a statutory maximum of more than one year but less than five years are increased to Level 12; offenses with a statutory maximum of life in prison are increased to a Level 37. *See* U.S.S.G. § 4B1.1(b).

<sup>27</sup>*Id.*

sentencing guidelines were declared facially invalid, in imposing a sentence under the indeterminate regime predating the 1985 Sentence Reform Act, this Court would impose the very sentence it imposes now. Although an indeterminate sentencing regime allows the Court to sentence without articulating its reasons or considerations, this Court's sentence would recognize the sentencing guidelines as advisory and worthy of great weight.

Accordingly, the Court overrules and denies the defendant's various objections to the pre-sentence report.

IT IS SO ORDERED.

Dated this 28<sup>th</sup> day of September, 2004.

S/ Julie A. Robinson  
Julie A. Robinson  
United States District Judge